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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
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Washington, D.C. 20536

File: EAC 01 177 53498

Office: VERMONT SERVICE CENTER

Date:

FEB 06 2003

IN RE: Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

PUBLIC COPY

INSTRUCTIONS:

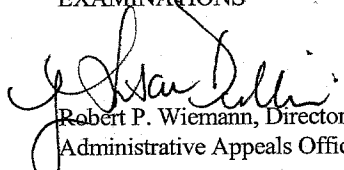
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a non-profit organization that claims to do business in the State of New York as a foreign corporation. It has been authorized to be in special consultative status with the United Nations. It seeks to employ the beneficiary as its chief executive director for the New York office. Accordingly, the petitioner seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, the petitioner asserts that the Service did not properly consider all the evidence submitted.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers.
-- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

(i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

(A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a

managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.

The issue in this proceeding is whether the beneficiary will be performing managerial or executive duties for the United States enterprise.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which

the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

It is noted that the petitioner does not clarify whether the beneficiary claims to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if the beneficiary is representing he or she is both an executive and a manager.

The petitioner initially stated that the beneficiary would be employed in the United States with the following duties:

Representative of this organization [the petitioner] to the United Nations

To take necessary actions for opening a new office in New York. In the first step, this office will conduct UN related affairs.

To manage New York office of this organization and act for providing all of the administrative, financial, logistical and human resources' requirement of it. [sic].

The director requested additional documentation to establish that the beneficiary would be employed in an executive or managerial

position in the United States.

In response, the petitioner stated that the beneficiary would have the following duties:

The highest executive official of US entity and responsible for precise administration of programs with complete observance of the regulations and executive policies (20 hours per week) [sic]

To build an independent financial capacity for US entity; overall planning and direction of all philanthropy initiatives and acting for soliciting gifts from individuals, corporations and foundations. (10 hours/week)

Survey and confirmation of annual budget, statement of accounts, balance sheets assessment of budget for previous and upcoming fiscal years. Supervision upon different expenses, collection of debts and claims, establishing different branches, closing any contract with companies, banks, offices and persons. (5 hour /week)

Legal representative of US entity in lawsuits of Institute as claims or defendant in all stages, with complete power including refer to primary and supreme courts, appointing attorneys and giving power to them, settlement of law suits. (5 hours/week)

Hiring senior managers of different departments (especially deputies of different undersecretaries) and briefing them about their duties and mission of department under their supervision.

The director determined that the petitioner's description of the duties of its staff was insufficient to establish that the beneficiary's position would be executive or managerial in nature. The director noted that the petitioner had not provided evidence that it employed others to provide the services of the organization and determined that it was likely the beneficiary would be primarily engaged in providing services to the organization and not directing the organization. The director concluded that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On a motion to reopen and consider submitted to the director, the petitioner asserted that volunteers comprised a predominant portion of its staff. The petitioner also asserted that the director had not considered its business plan and its mission. The petitioner also questioned whether the director had adequately considered that establishing an organization was an executive

duty, that having a leadership role was an executive duty, and that the organization with its mission would be able to support an executive position.

The director determined that the petitioner had not submitted evidence that as of the date of filing the petition the beneficiary had been and would continue to act in the position of a bona fide executive or manager. The director concluded that after a complete review of the record, the grounds of denial had not been overcome.

On appeal, the petitioner asserts that the beneficiary is directing the management of an essential function of the organization. The petitioner states that the title of the function is "involvement in those international and national United Nation processes related to social development, health, population, women, children and family." The petitioner states that the essential nature of the function is "Special Consultative status of this entity with the Economic & Social Council (ECOSOC) of the United Nations . . . and our commitments within the framework of UN resolution 1996/3 [sic]." The petitioner further asserts that the beneficiary is the chief executive director, and that two other individuals are the representatives to the United Nations. The petitioner states that "[t]he two UN representatives perform day to day operations related to this function including participation at different meetings, coordination with the different departments of the UN and other non-governmental organizations, coordinating and briefing working groups and transfer of the beneficiary's directives to them." The petitioner concludes that at the current stage of development of the organization, the beneficiary "manages this function and establishes the goals and policies of this essential function and functions at a senior level with respect to this function and exercises discretion over the day-to-day operations of the function and exercises wide latitude in discretionary decision-making."

The petitioner's conclusion is not persuasive. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). The petitioner initially stated that the beneficiary would open the petitioner's new office in New York, provide all of the administrative, financial logistical, and human resources required of the office, and be the representative of the organization to the United Nations. These duties are indicative of an individual providing basic operational services to the petitioning enterprise rather than managing or directing the enterprise. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner's response to the director's request for further detail regarding the beneficiary's proposed position does not significantly enlighten the Service regarding the beneficiary's day-to-day activities for the petitioner. The description is vague and general in nature. The most that can be gleaned from the description is that the beneficiary will administer programs, solicit gifts to build the financial capacity of the petitioner, review the budget, supervise expenses and claims, and hire senior managers. The description is not adequate to establish that the beneficiary will be performing managerial or executive duties with respect to these tasks rather than actually performing the tasks. Of note, is that the beneficiary will be required to hire senior managers, a confirmation that the petitioner has not yet employed senior staff. This information and the dearth of information in the record regarding other staff members whether volunteers or employees does not demonstrate that the petitioner has sufficient staff to relieve the beneficiary from performing non-qualifying duties. The petitioner's statements that it uses volunteers are not sufficient. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner's modification of the beneficiary's duties on appeal only confuses the record. The petitioner states on appeal that the beneficiary will actually be managing and directing an essential function of the petitioner. The function, however, is vaguely defined. Moreover, the assertion that two individuals will perform the "representative" function of the petitioner rather than the beneficiary is contradictory to the petitioner's first description of the beneficiary's duties. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988). The petitioner has not clearly and consistently set forth the beneficiary's daily duties. The petitioner has not established that the beneficiary will primarily be managing or directing the organization or a function of the organization rather than performing operational tasks necessary for the petitioner to continue its existence in the United States.

The petitioner appears confused on the requirement that it must establish eligibility at the time of filing. Regarding eligibility for this particular immigrant visa classification, the Service requires that the petitioner already be established. See 8 C.F.R. 204.5(j)(3)(i)(D). Thus the petitioner must establish that the proffered position is a position that is a managerial or executive position at the time of filing the petition, not a position that will possibly become a managerial or executive position at some future date. A petitioner must establish eligibility at the time of filing; a petition cannot be approved

at a future date after the beneficiary becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner also references its staffing levels at this stage of its development and appears to imply that the director did not properly consider the petitioner's stage of development. The director must consider the reasonable needs of the petitioner based on its stage of development if the director uses staffing levels as a factor in making the determination. However, in this particular case, it is not apparent that the petitioner has actually been doing business as defined by the Act for one year prior to filing the petition, thus meeting the threshold requirement of being an established business in the United States. The petitioner has not provided sufficient information to determine the reasonable needs of a company that has not been established for the requisite one year. Further, the number of employees or lack of employees serves only as one factor in evaluating the claimed managerial or executive capacity of the beneficiary. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily executive or managerial capacity. As discussed above, the petitioner has not established this essential element of eligibility.

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties are vague and fail to describe the actual day-to-day duties of the beneficiary. The small amount of information that actually describes the beneficiary's duties is more indicative of an individual primarily performing the necessary operational tasks of the petitioner. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has not established that the petitioner has been doing business for one year prior to filing the petition as required by 8 C.F.R. 204.5(j)(3)(i)(D).

8 C.F.R. 204.5(j)(2) states in pertinent part:

Doing Business means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

The petition was filed on April 20, 2001. The petitioner indicates that it initially applied for non-profit status with the State of New York in May of 1999. The approval of the non-profit status was completed in December of 2000. The petitioner also indicates that it applied for affiliation to the United Nations in New York in July of 1999 and that it was affiliated with the United Nations on April 10, 2000. The first information that indicates the petitioner became actively involved in United Nations processes is in late May of 2000. The mere establishment of an organization as a legal entity does not translate into an organization actively doing business. For the purposes of this immigrant classification, the petitioner has not provided sufficient information that it was involved in the active provision of goods or services one year prior to filing the petition.

Also beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary the proffered wage of \$31,200 per year.

8 C.F.R 204.5(g) (2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner has provided no evidence that it has the ability to pay the beneficiary the proffered wage. The record does not contain copies of annual reports, federal tax returns, or audited financial statements relating to the petitioner.

Further, beyond the decision of the director, the petitioner has not established that the beneficiary was employed in an executive or managerial capacity in one of the three years prior to his entry into the United States as a non-immigrant. The description of the beneficiary's duties for the overseas employer is vague and general in nature. The Service cannot assume that the beneficiary's title alone establishes the beneficiary's managerial or executive capacity.

For these additional reasons, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.